SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

No. 73-352

In the Supreme Court of the United States

OCTOBER TERM, 1973

WAYNE HUBERT BRASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The single issue is whether the Military Selective Service Act of 1967, 50 U.S.C. App. 451-462, is a constitutional means for the raising of manpower for military service.

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of refusing to comply with an order of his local board to report for and to submit to induction into the armed forces in violation of 50 U.S.C. App. 462(a). He was sentenced to two years' probation with a provision for special employment under the Federal Youth Corrections Act. The court of appeals affirmed (Pet. App. D).

The stipulated facts show that petitioner willfully and knowingly failed to report for induction as ordered by his local board acting pursuant to the Selective

Service Act. Petitioner argues that the Act is not a constitutional means to raise and support armies under Article I, Section 8, Clauses 12 and 18 of the Constitution, since it allegedly circumvents the constitutional processes for calling forth the Militia under Article I, Section 8, Clause 13. This contention was rejected in *United States* v. *Crocker*, 420 F. 2d 307 (C.A. 8), certiorari denied, 397 U.S. 1011.

In essence, petitioner urges the overruling of the *Selective Draft Law Cases*, 245 U.S. 366, in which this Court held that Congress can draft private citizens directly as a necessary and proper means to raise and support armies. He does not show, however, that those cases were incorrectly decided or present any convincing reasons why the Court should now re-examine them. See also *United States* v. *O'Brien*, 391 U.S. 367, 377, and cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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